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Supreme Court of the United States

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION

Petitioner,

vs.

THE CITY OF NEW YORK

Respondent.

REPLY BRIEF FOR PETITIONER

DAVID W. PECK
Attorney for Petitioner
48 Wall Street
New York, N. Y. 10005

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The City brief in opposition to certiorari undertakes no contest on the constitutional principles involved, and strives instead to present the case as involving only the resolution of "conflicting appraisal evidence" as to "quantum."

Nothing could be further from the truth. There was not a single disputed fact involved in the determination of the Court of Appeals and none is involved here. Nor did the appraisals of either side enter into the determination.* The determination was simply a *rule of law*—that valuation should be made solely on an adding machine basis of

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* The resolution of conflicting appraisals was made in the trial court and Appellate Division, where jurisdiction to review the facts ended, with awards $25,000,000 and $16,000,000 greater than the award made by the Court of Appeals.

totaling land and improvement costs, with nothing else to be given any consideration whatever.*

We believe, therefore, that this reply brief can serve most usefully by pointing up the City's default on every

* Therefore no correction of the City's factual statements is undertaken beyond this footnote limited to giving samples of how badly misstated or distorted the City's presentation is.

The City treats with claimant's agreed upon acquisition of some additional underwater land from the City by stating that a bill authorizing this sale "was introduced in the Legislature but failed of enactment and was never again introduced" (City Br. 9). The facts are that the City wanted to sell the land for incorporation into claimant's development and agreed to do so with unanimous approval of the City Council, but the bill for necessary state authorization, unanimously approved by the State Senate, reached the State Assembly too late for consideration that year. The bill was not reintroduced the next year because condemnation was in the offing, but every City witness concerned with the subject and the Speaker of the Assembly testified that the sale would have been completed as a matter of course if there had been no condemnation. The suggestion that claimant's plans "depended" on the acquisition of this underwater land (City Br. 21) is absurd, with claimant owning 122 acres of upland and 55 acres of underwater land in the initial area of development alone.

Similar references to rezoning, remapping, and the overall developer's agreement not being finalized (City Br. 9-10) omit that all were agreed upon and that the City witnesses again conceded that all formal approvals would have been obtained were it not for the condemnation. Indeed, the only "opposition" to claimant's development was from those who wanted to turn Breezy Point's matchless attributes to public use.

The City speaks of supposed "unavailability of financing" for the development (City Br. 43), stating that claimant faced "a shortage of $6.5 million in its financing of the project" and suggesting that development plans were consequently abandoned (City Br. 10-11). As the City well knows, there was no shortage in financing and it is using a false set of figures excluded from evidence; every step in the development had been fully financed by leading financial institutions, and all funds necessary to carry the development through to completion were readily available from like sources, including two of the principal investors in the development, Allstate Insurance Company and Continental Assurance Company. The development plan was not abandoned; it was ended and destroyed by condemnation.

And the City speaks of development "problems" with low-lying land and the need for extensive fill, without telling that elevations to protect the property completely had been agreed upon with the City and the exact amount of the fill needed and the cost were known and provided for.

aspect of the law in which the decision of the Court of Appeals manifested its unconstitutionality.

I.

There is no question that the *rule of law* laid down for this case, and for any following case involving unique property, is that a condemnation award for such property is to be based upon "actual sale price," on acquisition of the property by the condemnee, "plus recompense for developmental enhancement," which "enhancement" is, in turn, to be measured by "the *costs* of developmental enhancement" (City Br. 23-26).

This determinative holding was not premised on any factual finding that cost figures represented fair market value—a subject altogether eschewed by the court. On the contrary, there were affirmed and conclusive findings of fact—with respect to the two transactions that the Court of Appeals said in its first opinion should be given "some consideration" (56a), but which finally became the sole consideration in determining the "sale price" that was to be used as land acquisition cost—that (1) claimant's original contract to purchase Breezy Point was "something less than a normal market sale" that "does not reflect the true or actual value of the property" (45a-46a), and (2) the assignment by claimant to the Breezy Point Cooperative of the right to purchase a portion of the property was "indeed a forced sale" in which "claimant was under compulsion to sell to the Cooperative on the Cooperative's own non-negotiable terms" (45a).*

The Court of Appeals' rule that, *irrespective of the facts,* the award was to be based on costs, cannot stand

* References are to Appendix to Petition for Writ of Certiorari.

against this Court's uniform holdings that "it is the property and not the cost of it that is safeguarded by state and federal constitutions" (*Olson* v. *United States,* 292 U.S. 246, 255 (1934)); that original cost is "the false standard of the past" (*United States* v. *Toronto, Hamilton & Buffalo Navigation Co.,* 338 U.S. 396, 403 (1949)); and that "the general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price" (*United States* v. *Commodities Corp.,* 339 U.S. 121, 130 (1950)).*

Clearly constitutional law is, and could not be otherwise, that a landowner is entitled to receive on condemnation the fair market value of his property at the time of taking and in its then state of exploitation—not a return of costs. The rule laid down by the New York court is plainly unconstitutional, and undermining of the entire law of condemnation as far as unusual properties are concerned.

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* In apparent pursuit of its unfounded theory that the award represented a resolution of "conflicting appraisal evidence," the City comes up with the assertion, false on its face, that the $15,000,000 award was based on the City's appraised value of $11,819,000 (which took no account of developmental enhancement), which it falsely says was several times petitioner's purchase price (City Br. 29-30). The City seems to forget that in its last presentation to the Court of Appeals it said "the award was based" on the "price paid by the Co-op," and that in the immediately preceding tortured figuring in its brief (City Br. 25-26), like the unfathomable figuring in the Appellate Division's dissent (17a), it arrives at $4,300,000 as "the costs of developmental enhancement," leaving only $10,700,000 for the land itself, "based," as the dissent in the Appellate Division said, upon the "actual sales price" on acquisition (17a).

As pointed out in the petition (fn. p. 15) the $10,700,000 figure does jibe with the price paid by the Cooperative, without any allowance for normal land appreciation or inflation over the three years preceding condemnation, which a City appraiser said would be 5% a year for land with no development going on, and which claimant's appraiser said would be 10%. The figure also jibes with the purchase price under claimant's contract of purchase with a midway inflation factor.

As to how claimant has made out on this costs based award: with having to pay over $7,000,000 in interest alone on pre-condemnation construction and development loans at rates far in excess of the rate paid by the City under its special exemption from paying market rates on a condemnation award, and pay for economic and market studies, expert services, legal fees, trial minutes, printing of records and briefs and myriad other expenses of preparation and conduct of two trials and six appeals over thirteen years, the result, as noted in the petition (p. 16), is that the award made has completely wiped out claimant's common stock, that had a market value just before the first rumors of condemnation of over $25,000,000, and its junior preferred stock, representing a 1961 cash investment of $5,000,000, plus loss of accrued interest of over $5,000,000.

II.

There is no question that the New York court has laid down a rule of law that excludes from consideration all market data—the essential basis of a constitutionally required market valuation—resulting in a valuation and award far below the minimum value of land available for apartment house use in the City of New York as established by sales of vastly inferior properties.

Thus excluded were all sales of properties offered as comparables by either side, including properties offered by both sides. The experts for both sides at both trials, in accordance with standard and universally accepted valuation methodology, used sales and a large number of them. But the Court of Appeals would have none of them. This exclusion of sales, coming on top of the exclusion of the other standard and accepted method of valuation by capitalization of expected income, made a determination of value and just compensation impossible. That is unconstitutionality (*McCoy* v. *Union Elevated R. R. Co.,* 247 U.S. 354 (1918)).

The City would have it that this blanket exclusion of sales was but a discriminating consideration of similarity. The pretense is empty. Not a word was addressed to any of the individual sales placed in evidence in the second trial, except for Birchwood, in either of the Court of Appeals' second and third opinions, and the dissent in the Appellate Division simply took the words of the trial court that the sales were not "truly comparable"—ignoring the sense in which the words were used, as the trial court explained, that the sales did not "measure up in value to Breezy Point" (29a) and could not be "adjusted with any degree of mathematical precision" to Breezy Point (48a)—as disposing of them. Also ignored was the fact that the trial court could and did find, as anyone could in any market, that sales of patently inferior properties give at least "a vestige of value" as related to a superior property, as the trial court found was the case in relating the sales properties to Breezy Point (43a-44a).

The irony and injustice lie in the fact that the condemned property was made the victim of arbitrary rule and the exclusion of all precepts and standards of valuation because of its virtues—because it was "a precious asset incapable of duplication" (the Mayor's words in recommending condemnation), because it was "the last remaining oceanfront in New York and one of the world's great beaches" (words of the City Planning Commission in deciding to condemn), because it was unique and nothing could be cited for comparison that could "measure up in value." Could there be less of an excuse for throwing away the book of valuation and all condemnation principles and practice, for abandoning the rational altogether and ending up with a valuation far below the market for far inferior properties?

The only proper and constitutional response to the uniqueness of Breezy Point as a condemnation problem is that dictated by this Court in *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949), that even "scattered sales" of other properties "bearing on what a prospective purchaser would have paid" must be considered. The trial court and Appellate Division complied; the Court of Appeals dismissed all sales from consideration. What this augurs for the future in the valuation in condemnation of the most valuable properties is too clear for comment, unless this Court applies constitutional correction. Just as the answer given to the old observation that the power to tax is the power to destroy was "Not so long as this Court sits," the answer should be the same to threatened destruction by exercise of the power to condemn, such as the Court of Appeals has wrought by its rule of law in this case, destroying the landowner's property interests without constitutionally mandated compensation.

III.

There is no question that the New York court has laid down a rule of law flatly prohibiting the use of the capitalization of estimated future income method of valuing property in cases of land under development.

Whatever may be said about the use of capitalization in cases where development has only been planned and no construction has taken place—like *United States* v. *25.406 Acres of Land*, 172 F.2d 990 (4th Cir.), *cert. denied*, 337 U.S. 931 (1949), and *United States* v. *Waterhouse*, 132 F.2d 699 (9th Cir. 1943), *aff'd mem.*, 321 U.S. 743 (1944), in which the use of capitalization evidence was given reasoned sanction

(Petition, 28-30)*—there should be no question that when a development has gone as far as the development here, with eight buildings advanced in construction and ready for rental, and a shopping center virtually completed and fully rented, the use of capitalization should be allowed.**

All the experts on both sides at both trials agreed that a prospective purchaser—whose valuation processes constitute the standard by which courts are required to make condemnation valuations, as this Court has repeatedly

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* The City seems to suggest (City Br. 37), that this Court ruled out capitalization in a case of a "non-existent development" in *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266 (1943), but the Court there expressly stated that it did not reach this question, which it described as being "much discussed at the bar and in the briefs" (319 U.S. at 285).

The City makes the captious point that the capitalization evidence in *25.406 Acres of Land* was admitted not as direct evidence of value but as matter considered by an expert witness in arriving at his estimate of value (City Br. 38). That is the only way that capitalization evidence, and sales evidence as well, comes into any case, just as it was in this case. And contrary to the City's depiction of *25.406 Acres of Land* as admitting capitalization evidence merely as evidence of highest and best use (City Br. 38), the court made it clear that "in estimating the value of the property" for its best use, "i.e., what a willing buyer would have to pay a willing seller to purchase it, the witness should be allowed to take into consideration what it would cost to develop the property in this way and what income could be expected from it when developed" (172 F.2d at 993).

**Perversely, having succeeded in getting the use of capitalization excluded in the valuation process, the City takes claimant to task for not having introduced capitalization evidence at the second trial on the subject of best use (City Br. 22, 40). Such evidence in abundance was adduced at the first trial and stricken from consideration altogether. When the parties stipulated the evidence from the first trial that was to be received at the second, all capitalization evidence was omitted by common consent that it was not admissible for any purpose. It remains only to add that, as in *25.406 Acres of Land,* there is no support for the City's contention that such evidence might be used to establish best use but not to establish value.

stated (Petition, 22-24)—would have employed capitalization in this case.*

As the basis for its exclusion of capitalization methodology, the Court of Appeals hypothesized, so contrary to fact, that "no part of the work had been contracted for or started" on claimant's development. The City can only continue the pretense that this case is concerned only with a "non-existent development" as the basis of its defense of the Court of Appeals' ruling (City Br. 37).

When, however, the Court of Appeals was taxed on the second appeal to that Court with the untenability of the predicate of its decision with respect to capitalization, the court went further in its rule of exclusion and dictation of valuation based on costs by stating that an award based on costs is proper when the condemned property is "unexploited or only partially exploited" (5a-6a). Thus the rule of law enunciated is that unless a property is fully exploited the prime method for valuing property under development that would be used in the market place and by any prospective purchaser may not be employed in New York state. This is a rule of law, we respectfully submit, that cannot pass federal constitutional muster, particularly when, as here, it is combined with the exclusion of sales and every other consideration that is requisite to a fair market valuation.

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* It is not true that claimant's capitalization evidence at the first trial proceeded, as the City says in its diversion, "on the assumption that it had already borne all of the risk of successfully financing, building and renting its apartment house communities" (City Br. 36). The valuations by capitalization included substantial discounts for risk and profit factors. The issue, however, is not whether the capitalization evidence had flaws or whether a different valuation might be made by capitalization by another expert. The issue is whether capitalization evidence is admissible at all in valuation of a property advanced in development.

IV.

There is no question that the rule of law enunciated by the New York court of valuation on a costs basis gives no consideration to and takes no account of best use and is thus in direct conflict with the principle, often reiterated by this Court, that property must be valued on the basis of the highest and best use to which it could be put at the time of condemnation, regardless of how it was used before (Petition, 30).

While the City badly asserts that "the New York courts compensated petitioner for its planned use of the land as the best use thereof" (City Br. 42), there is not and could not be any reference in the brief to indicate that the Court of Appeals paid any attention to best use, for, as was pointed out in the petition, the court made no mention of best use in any of its three opinions, although that was a featured subject in all briefs of both sides on each occasion the case was before the court. It may be gleaned from the City's following citation of the *Chestnut* case (39 App. Div. 2d 573), which the Court of Appeals held in our case stated the proper rule for valuing "unexploited or only partially exploited" property on the basis of costs, that the City is simply taking its reference to that case, as involving "an on-going apartment house development [that] was held to be the land's best use," as signifying that the court made the same determination here. Not only is there no support for the insinuation, it is clear that the Court of Appeals made no such determination in this case because it set itself against recognizing any "on-going apartment house development" or that any development had taken place at all.

Further, it is absolutely clear that the award in this case was not made, as was required, on the basis of an apartment house use—conclusively determined to be the best use by the Appellate Division's affirmance of that determination by the

trial court—but was based on a bungalow use, as that was the only use of the property when claimant acquired it. Likewise, as a City appraiser conceded, the purchase by the Cooperative was not for the property's best use, but was specifically for continuing a bungalow use. Valuation, based as it was only on acquisition costs in those transactions, represented a valuation only for bungalow use, not the use to which the property was dedicated and so far advanced at the time of condemnation three and a half years later. The rule of law adopted by the Court of Appeals is thus shown again to be in violation of constitutional commands.

V.

There is no question that in all—mandating a valuation based solely on costs and ruling out of consideration all market data and the standard methods of valuing property—the New York court has violated the cardinal constitutional principle, repeatedly expressed by this Court (Petition, 22-25), that all facts and factors that a prospective purchaser of the property would consider must similarly be considered by a condemnation court in determining value.

In all of this there is no factual "issue of quantum" or any other factual issue or matter of resolving "conflicting appraisal evidence." It is a matter entirely of governing law in conformity with constitutional requirements, as to which there was no difference among appraisers.

The *City* experts all conceded that determination of best use was the first essential to valuation, that any prospective purchaser of the property would employ capitalization, as well as sales, in reaching his determination

of value and what he would pay for the property; all purported to reach their valuations on the basis of sales and acknowledged that they were prevented from using what they considered to be the most pertinent sales, in the area adjacent to Breezy Point, by the court's ruling. As all sales, as well as capitalization, best use and all market data went out with the Court of Appeals rule of law, all appraisals went for naught. Indeed, there was nothing to appraise. An adding machine was substituted for appraisers and its totalizing for appraisals and a decision.

There need never have been a trial for there was nothing to try in the eyes of the Court of Appeals. Nothing in either trial mattered. The one thing to be said for the decision, if it should be upheld, is its simplicity in saving trials whenever an extraordinary property is involved and development is interrupted by condemnation. But the constitutional guarantees of just compensation will have been written out of the Constitution. Only this Court stands in the way.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David W. Peck
Attorney for Petitioner
48 Wall Street
New York, N. Y.

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